



**Upper Tribunal
(Immigration and Asylum Chamber)**
AA/41722/2013

Appeal Number:

THE IMMIGRATION ACTS

Heard at: Manchester

On: 7th July 2014

Determination

Promulgated

On 8 July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE BRUCE

Between

**Yuet King Leung
(no anonymity order made)**

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: Dr Mynott, Latitude Law
For the Respondent: Ms Johnstone, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a British National (Overseas) born on the 12th May 1977. She has permission to appeal against the decision of the Respondent to refuse to vary her leave to remain and to remove her from the United Kingdom pursuant to s47 of the Immigration, Asylum and Nationality Act 2006.

Background and Grounds of Appeal

2. The Appellant's immigration history is not altogether clear but it would appear that she first entered the UK in 2001 as a visitor. She was thereafter granted

various extensions. She married a Mr Wu Wei Han, a Chinese national in the UK as a work permit holder, and in December 2003 she was granted leave in line with him, until the 8th August 2007. In June 2010 the Respondent received an application for settlement from the Appellant. This stated that she was living with her husband and included a copy of her marriage certificate and both their passports. The Respondent granted Discretionary Leave until the 1st September 2013. In August 2013 she made an application for settlement, submitting that she had been in the UK for 12 years and she was settled here. The Respondent sought clarification about the status of the Appellant's marriage and were told by reply that in fact the marriage had broken down in July 2012 when he had left her following a long period of trouble related to his gambling and violence. A letter was supplied from a neighbour who claimed to know the couple who confirmed the account given.

3. The Respondent refused the application. The Appellant did not meet the requirements of Appendix FM or paragraph 276ADE and there were no exceptional circumstances. The grounds of appeal repeated the account of marriage to Wu Wei Han, violence, gambling and desertion.
4. When the matter came before Judge Brunnen the entire basis of the Appellant's case had changed. It was now admitted that in fact she was in a relationship with Chinese national Yong Chen and that they had two children together, born in 2008 and 2010. It was submitted that she should be given leave to remain on the basis of this family life in the UK. The new evidence was that she had been living with this man since 2005. The Appellant denied having lied to the Home Office in earlier applications and said that it had been her then representatives who had put forward the case that she was still in a subsisting relationship with Wu Wei Han. She submitted that she and her family cannot return to her native Hong Kong, since her partner and children have no right to enter Hong Kong. Various matters relating to the family's private life in the UK were set out.
5. Judge Brunnen found that the Appellant had knowingly deceived the Respondent when in 2010 she had made an application for further leave to remain on the basis that her marriage was subsisting. She had attempted to perpetrate the same deception in 2013. Judge Brunnen notes that at approximately the same time the Appellant's partner Yong Chen had made an application to the Respondent, using different solicitors, and he had made no mention of her or the children. He found that both had known full well that their applications were being advanced on a wholly false basis. It was not just the applications forms that were untrue but the couple had procured false evidence to support the applications, namely the letter from the neighbour. Judge Brunnen concluded that this behaviour "utterly destroyed" their credibility as witnesses.
6. The Appellant could not succeed under the Immigration Rules. It was submitted that the decision of the Respondent was "not in accordance with the law" because the Respondent had not considered the family life now relied upon. Judge Brunnen found there to be nothing in this line of argument: "the Respondent could not consider what the Appellant had concealed". Further the Appellant could not show that the decision was flawed for a failure to consider

the policy on Discretionary Leave: that policy did not avail her since it related to cases where there had been no change in circumstances since the last grant of DL. Plainly there had been a significant change in circumstances in this case. The principal submission was that the Appellant's removal would be an interference with her family life:

"[Dr Mynott] submitted that as no decision has yet been made to remove Yong Chen or the children, the decisions in respect of the Appellant will therefore result in the separation of the family. I do not accept this. Neither Yong Chen nor the children have any right to be in the UK. None of them has any outstanding appeal. The removal of the Appellant would not, contrary to the submissions of Dr Mynott, amount to separating the Appellant from her partner and children. There is no suggestion that the Respondent would remove her without also removing Yong Chen and the children. There is no reason why they cannot all go together"

7. The determination goes on to address the 'best interests' of the children. It was found that their best interests lay in being with their mother and father and that removal of the whole family would not be to their significant detriment. Judge Brunnen noted the evidence that the Appellant had made efforts to establish whether her family could join her in Hong Kong and had discovered that they could not do so. He rejected that: documentary evidence to that effect was lacking and he was not prepared to take her word for it. Even if she had established such a practical difficulty there was no reason why the family could not relocate to mainland China. The decision is found to be proportionate in all the circumstances.

Error of Law

8. Permission to appeal was sought on the ground that the First-tier Tribunal erred in concluding that there was "no suggestion" that removal would not be with the children and Yong Chen. The grounds set out the procedural hurdles that would need to be crossed if and when the Respondent took enforcement action against Yong Chen and the children. There were no removal decisions at present and before they could be made the Respondent would have to comply with her own guidance. This would all take some time and it could not therefore be said that the removal of the other family members could be affected in a reasonable time period. There would therefore be an interference with the family life if the Appellant were to be removed before that. The Respondent had not given any assurances that the family would be removed together.
9. Permission was granted by First-tier Tribunal Judge JM Lewis on the "issue of principle of the removal of an Appellant exercising family life with family members who are not removable within a reasonable timescale or at all".

10. The Respondent opposed the appeal. It is pointed out that the Respondent cannot be criticised for failing to take any of this into account since it was never put before her. The Tribunal was entitled to take the view it did. Before me Ms Johnstone clarified that there was no question of the Appellant being removed without the position of her children being considered; she submitted that the entire appeal was misconceived.

My Findings

11. In his submissions Dr Mynott explained that Yong Chen had outstanding representations under the 'Legacy' programme and that he would wish to pursue these. This would involve the Respondent reaching a decision, taking into account all the relevant factors pertaining to that policy as well as Chapter 53 and the best interests of the children. The remaining family members could not lawfully be forcibly removed until that was done.
12. It may well be the case that Yong Chen has a case under the 'Legacy' policy. If he wishes to pursue that he can judicially review the Respondent's failure to make a decision, or even write a letter chasing them up. That is all, as I understand it, uncontentious. It is not however the case that the decision to remove this Appellant will necessarily interfere with her family life. The children and her partner presently have no leave to remain in this country. Judge Brunnen did not accept that there were any practical impediments to them joining her in Hong Kong, nor in mainland China; nor did he consider it contrary to the children's best interests to go with their parents to China or Hong Kong. It is therefore open to them to make a voluntary departure. With respect to Dr Mynott, the question of whether the Respondent has taken removal directions against them is not in these circumstances relevant. With respect to Judge Lewis, nor was any analysis about whether they were "removable...at all".
13. I am not satisfied that the First-tier Tribunal erred in proceeding on the basis that the family would leave the UK together. Any fears that the Appellant may have about being removed without her children have hopefully been put to rest by Ms Johnstone's assurances before me that the Respondent would not remove her without her children, or at least without having regard to their welfare.

Decisions

14. The decision of the First-tier Tribunal contains no error of law and it is upheld.

Deputy Upper Tribunal Judge Bruce

7th July 2014